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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 673

GEORGE CAMPBELL PAINTING CORP.,
Appellant,

against

WILLIAM REID, FRANCIS V. MADIGAN, IRA S. ROBBINS, Members of the New York City Housing Authority, and THE NEW YORK CITY HOUSING AUTHORITY,
Appellees.

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Appellant,

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Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF APPELLEE NEW YORK CITY HOUSING AUTHORITY

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The text insofar as pertinent herein of Sections 2, 3, 151, 157(1) of the Public Housing Law are set forth in the Appendix to this Brief. Said sections are published in McKinney's Consolidated Laws of New York, Annotated Book 44A. There are also set forth therein, Article 18, Section 1 of the New York State Constitution and Chapter 645, Laws of 1964 (Public Authorities Law 2604).

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BRIEF OF APPELLEE NEW YORK CITY HOUSING AUTHORITY

Statement of Facts

Appellee New York City Housing Authority is a public corporation created by the State of New York, and with other such housing authorities is declared by the New

York Public Housing Law to be "agencies and instrumentalities of the State" (McKinney's Consolidated Laws of New York, V. 44A, Sections 2, 3 subd. 2, and 401) (App. 37-38),* established to carry out the functions of slum clearance and provision of low-rent housing for persons of low income provided for in Article 18, Section 1 of the New York Constitution (McKinney's V. 2, part 2, p. 475) (App. 40).

After public bidding and award pursuant to Section 151 of the Public Housing Law (App. 39) three written contracts for maintenance painting of appellee's projects were entered into between appellant and appellee (A. 51, 79) [while not printed in the Appendix or the Record in the court below, these contracts were incorporated therein by reference (A. 79, Hessel affidavit, Par. 6)].

The respective contracts were executed on behalf of appellant by George Campbell, Jr. as its President (A. 79) on October 15, 1964, October 20, 1964 and November 30, 1964, respectively (see also, A. 110-112). In addition to other items, George Campbell, Jr. executed, in each of such contracts, the Statement of Non-Collusion required to be contained therein by Section 2604 of the Public Authorities Law (App. 41), as then in effect by virtue of Chapter 645 of the Laws of 1964, effective September 1, 1964 (McKinney's Session Laws of New York—1964, p. 1023).

Each contract included provisions, set forth in the Appendix in full (A. 80-81), which in substance specified that upon refusal of any person, when called before a Grand Jury to testify as to transactions or contracts had with the State or its agencies, including public authorities, to sign a waiver of immunity against criminal prosecution, or to

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* Reference to the joint Appendix is designated "A" followed by the page number. Reference to the Appendix to this Brief is designated "App." followed by the page number. Reference to Appellant's Brief is designated "Ap. Br." followed by the page number.

answer relevant questions concerning such transactions or contracts:

(a) such person, and any firm of which he is a member, partner, officer or director shall be "disqualified" from thereafter bidding upon or receiving awards of contracts with appellee for five years thereafter; and

(b) the contract may be cancelled and terminated.

Like the Statement of Non-Collusion above referred to, these standard provisions of the contracts were mandated by the Public Authorities Law, in this instance Section 2601 (A. 81; Ap. Br. 21-22).

Upon learning that a Grand Jury investigation was being conducted by the District Attorney of New York County into bid rigging, bribery, conspiracy and other crimes in connection with contracts of appellee and other public agencies (A. 51-52, 85, 106), and that appellant's officers could be expected to be subpoenaed therein and requested to waive immunity, its President, George Campbell, Jr., purportedly resigned that office and as a Director, and surrendered all his stock in appellant corporation (A. 52, 95-98). All this was expressly in contemplation of his imminent call before the Grand Jury and his intent to refuse to waive immunity or to answer questions (A. 52). Further, it was with full knowledge and advice by counsel of the "penalties that would result" if any officer refused to waive immunity (A. 52). Indeed, appellant's brief states even more specifically that its officers "were told of the disqualification provisions of the Public Authorities Law" (Ap. Br. 5).

Having been informed by the District Attorney of George Campbell, Jr.'s refusal to sign a waiver of immunity (A. 85, 105), appellee forwarded a letter to appellant cancelling and terminating the contracts, and advising that it

would be "disqualified" from further bids upon or award of contracts of appellee for a period of five years. This was based expressly upon the contract provisions, and no reference was made in the letter to the provisions of the Public Authorities Law (A. 106-107).

Appellant's counsel by letter (A. 19-22) vigorously protested this action, requested a hearing, and expressly based such protest upon the alleged misinterpretation of the contract provisions by appellee. This was predicated upon the contention that George Campbell, Jr. had assertedly resigned his offices and surrendered his stock, had thereby severed all official relationship with appellant before his call to the Grand Jury and refusal to waive immunity, and was therefore not then an "officer" within the meaning of the contract provision in question (A. 21).[1]

Throughout all the subsequent litigations brought by appellant this contention of misinterpretation of the contract provisions was consistently maintained, and made the entire basis for its demand for relief (A. 10, 25, 51, 53, 69, 72, 119). No other issue tendered by appellant, constitutional or otherwise, appears in the record, the constitutional issue having been raised only on appeal, and solely by briefs of counsel. Nor did the New York Supreme Court or the Appellate Division, in their decisions, make any reference to constitutional questions, basing their decisions solely upon the issue of contract interpretation tendered by appellant, and appellee's defenses of availability of other exclusive judicial remedies (A. 34, 130; 48 Misc. 2d

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[1] Appellant's Brief, page 6 says: "Indeed, in appellee's motion to this Court to dismiss the appeal (pp. 12, 19-21), they stressed the fact that, at that time, George Campbell, Jr. was a complete stranger to appellant." This is out of context. What was clearly indicated in the motion was that this was *appellant's* contention, based upon George Campbell, Jr.'s "asserted divestiture", and that *appellant* "firmly and adamantly maintained" that he was legally and actually a total stranger to appellant corporation. The record shows that appellee disputed the effectiveness of this "asserted divestiture" (A. 89, 91-102).

544; 26 A. D. 2d 912). The New York Court of Appeals, however, has stated in its opinion upon affirming that it held Section 2601 of the Public Authorities Law constitutional (A. 134; 20 N. Y. 2d 370, 229 N. E. 2d 602), and upon this finding the jurisdiction of this Court is invoked.

Although appellant's notice of claim (A. 24-27), which was a prerequisite to the institution of litigation against appellee (Public Housing Law, Section 157, subd. 1; App. (40), sought damages for wrongful cancellation of the contracts and their reinstatement, as well as removal of the disqualification of appellant from bidding, the proceeding and action thereafter instituted, and now the subjects of the appeal to this Court, were grounded solely upon the disqualification (A. 13, Petition, Par. 39), and the sole relief sought was the enjoining or removal of such disqualification (A. 13, 49, 70).

In the nature of affirmative defenses to the relief demanded, appellee set forth two principal contentions: (1) that appellant's exclusive remedy for removal of the disqualification was the judicial proceeding provided by Section 2603 of the Public Authorities Law (App. Br., 23-24; A. 86-88, 103-104), and (2) that both appellant and its President, George Campbell, Jr., had theretofore been indicted by the New York County Grand Jury on three counts of perjury in the first degree by reason of the falsification of the statement of non-collusion executed by George Campbell, Jr. in each of the contracts in question, as above noted (A. 102). A copy of such indictment is in the record (A. 110-113),[2] and was urged upon the

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[2] This indictment was handed down prior to the proceedings in the New York Supreme Court, and is accordingly contained in the record (A. 110-113). It is respectfully considered appropriate that this Court be informed of what has transpired with respect thereto since the proceedings were terminated in the New York Supreme Court, where the record was made, as well as subsequent to the determination of the appeals in the New York Court of Appeals.

(Footnote continued on following page)

courts below as a bar to the equitable relief sought (A. 102, 104).

It will be noted that antedating the Article 78 Proceeding and the plenary action set forth in the record appellant had commenced a prior Article 78 Proceeding, which contained a cause of action for relief from the disqualification under Section 2603 of the Public Authorities Law (erroneously referred to as Section 103(c) of the General Municipal Law, which is identical, but covers Municipal agencies other than public authorities), naming as parties thereto, as provided in Section 2603, the Attorney General of New York and the District Attorney of New York County; and that this proceeding had been voluntarily discontinued by appellant (A. 35-36, 77-78). It will further be noted that the New York Court of Appeals has held such Section 2603 proceeding to be appellant's exclusive remedy for the relief it seeks (A. 135; 20 N. Y. 2d 370, 376-377).

(Footnote continued from preceding page)

The final Order and Judgment of the Supreme Court in the Article 78 Proceeding was made December 14, 1965 (A. 30), and the final Order appealed from in the Plenary Action was made March 18, 1966 (A. 122). Thereafter, on October 17, 1966 George Campbell and the appellant (sub nom. George Campbell & Co., Inc.—see A4 Par. 7) were further indicted by the New York County Grand Jury, under Indictment No. 3954-66, for Conspiracy to Prevent Competitive Bidding on Public Contracts. Had this occurred during or prior to the proceedings in the New York Supreme Court it certainly would further have been made part of the record, as was the indictment for Perjury above referred to.

After the decision by the New York Court of Appeals on July 7, 1967 (A. 39, 42, 131, 134; 20 N. Y. 2d 370), and while the appeal to this Court was pending, George Campbell, Jr. and appellant pleaded guilty during trial of the Conspiracy case to cover both the Conspiracy and the Perjury indictments. Copies of the Certificates of the County Clerk and Clerk of the Supreme Court, New York County, to that effect, are set forth in the Appendix to this Brief (App. 42-43).

The foregoing is respectfully submitted for such relevance as this Court may deem appropriate to attribute thereto (Cf. Thorpe v. Housing Authority, 386 U. S. 670, 671-672).

Appellant has stated that the work performed for appellee by it and its predecessor constituted less than fifteen percent of its total annual volume (A. 10).

Summary of Argument

Appellee contends that:

1. Should Section 1123 of the New York City Charter, in issue in the *Gardner* (No. 635) and *Sanitation* (No. 823) cases, be held constitutional, then similarly Section 2601 of the Public Authorities Law, in issue in this case, should be so held. In the light of the particular circumstances of this case, however, the converse is not true, and the determination of the New York Court of Appeals appealed from herein should nevertheless be affirmed regardless of the outcome of the *Gardner* and *Sanitation* cases.

2. Statutes like Section 1123, requiring public employees to waive immunity and to answer questions relevant to their qualifications for employment, on pain of dismissal, have been held constitutional by this Court, and should continue so to be held. Section 2601 of the Public Authorities Law is directed to a similar purpose in the public interest, to wit, the ascertainment of the qualifications of public contractors, and they should be held to no less an obligation.

3. The requirement that appellant's officers waive immunity and answer relevant questions before a Grand Jury on pain of disqualification from future bidding, as mandated by Section 2601, was a valid condition to the contracts.

ARGUMENT I

A public contractor should be held to requirements and standards of candor and disclosure of information bearing upon his qualifications and responsibility at least as extensive as those which may constitutionally be imposed upon public employees. Accordingly, if waiver of the Fifth Amendment privilege under threat of dismissal may constitutionally be required of public employees, *ipso facto* the requirement of such waiver by a public contractor under threat of disqualification from bidding should be held constitutionally permissible.

The New York Court of Appeals cited, as authority for its determination upholding the constitutionality of Section 2601 of the Public Authorities Law in this case, its decision in *Matter of Gardner* v. *Broderick*, 20 N. Y. 2d 227, handed down at the same time (20 N. Y. 2d 370, 376). In the *Gardner* case it upheld the constitutionality of the requirement of Section 1123 of the New York City Charter and Article I, Section 6 of the New York Constitution that upon pain of dismissal every public employee must waive his Fifth Amendment privilege and answer questions when called to testify before a Grand Jury concerning his conduct in office. Gardner, a New York City policeman, had been dismissed pursuant to Section 1123 for his refusal to do so.

The constitutionality of Section 1123 of the Charter was also in issue in the case of *Uniformed Sanitation Men Association, Inc.* v. *Commissioner of Sanitation, Inc.*, decided by the U. S. Court of Appeals, U.S.C.A., 2d Circuit, 383 F. 2d 364 (1967) (hereinafter the "Sanitation" case). The dismissal of New York City sanitation men, pursuant to Section 1123, for refusal to waive immunity and

to answer questions either before the City Commissioner of Investigation or the Grand Jury was therein also sustained as constitutional.

The constitutional issues on this point in the *Gardner* and *Sanitation* cases are accordingly basically identical. The appeals therein to this Court (Gardner, No. 635; Sanitation, No. 823) are to be argued together with the instant appeal. Under the circumstances it appears quite clearly that a determination in those cases upholding the constitutionality of Section 1123 will have a major, if not conclusive, impact upon the constitutional issue raised in the case at bar. But, while appellee contends that if the constitutionality of Section 1123 of the Charter is upheld *ipso facto* that of Section 2601 of the Public Authorities Law should likewise be upheld, it will be shown in Argument IV below that the converse is not necessarily true, and that in any event, in the particular circumstances of this case the judgment of the New York Court of Appeals should nevertheless be affirmed.

A. Public contractors, like public employees, may constitutionally be required to waive immunity and to furnish information relevant to their qualifications.

Appellee respectfully submits that if the requirement of waiver of the Fifth Amendment privilege by public employees on pain of dismissal, pursuant to Section 1123 of the New York City Charter, is held to be constitutionally permissible in the *Gardner* and *Sanitation* cases, then *a fortiori,* or at least equally, the requirement of Section 2601 of the Public Authorities Law, and the contract provisions mandated thereby, that public contractors like appellant similarly waive such privilege on pain of disqualification from bidding, should also be held valid.

That in this respect a public contractor ought at the least to be equated with public employees has perhaps best been stated in *United States ex rel. Laino* v. *Warden,* 246

F. Supp. 72 (S.D.N.Y. 1965), aff'd. 355 F. 2d 208 (2d Cir. 1965), as follows: "We affirm on Judge Tenney's opinion below, reported at 246 F. Supp. 72 (1965)". Judge Tenney, in an exhaustive opinion upholding the constitutionality of Section 103-b of the General Municipal Law (246 F. Supp. 72, 98), which is a counterpart of Section 2601 of the Public Authorities Law (246 F. Supp. 72, 92), said:

> [p. 94]: "The requirement in Section 103-b, that public contractors waive immunity before investigative bodies on the sanction of possible disqualification, has the same valid basis as those involving public employees.
>
> "Accordingly, it can be argued that the sanction of possible disqualification present in Section 103-b is predicated on the lack of candor and frankness which is expected of one doing business with the state, and that such lack of cooperation and failure to discharge one's responsibility is incompatible with the position held, rather than a disqualification, *eo instantio*, based solely on one's invocation of his Fifth Amendment right. This rationale is, of course, the saving grace whereby prior sanctions of this nature have withstood judicial scrutiny."
>
> [p. 95]: "Moreover, in one sense relator owed a higher duty to freely discuss and answer questions relating to the performance of his official acts than a Government employee. In the case of a public employee, the state has at least a choice of hiring or not hiring an individual, whereas in the case of a contractor the state's ability to choose is severely restricted."
>
> [p. 96]: "Similarly in the case at bar, relator possessed no inalienable right to contract with the state. His right in that regard could be tempered by reasonable conditions imposed upon him, one of them being the necessity of being candid with the authorities and giving full answers to questions propounded by in-

vestigative bodies, the answers to which would reflect on his qualifications and fitness to utilize the privilege of doing that business. Accordingly, it is not unreasonable for the state to expect that business done with it was aboveboard and that persons doing that business would be frank and assist in the investigation of their qualifications. To impede that investigation by any device is to preclude the state from judging those qualifications and breach the trust imposed on a 'quasi' governmental official such as a public contractor."

B. Public Authorities Law, Section 2601 is no less designed to obtain information as to qualifications than are similar statutes relating to public employees.

Appellant appears to concede that if the inquiry at which the waiver of the privilege is required is related to "* * * a legitimate inquiry of the person's qualifications for such contract, public employment or license, the failure to be candid justified the sanction, without offending the due process clause" (Ap. Br. 10). It then goes on to assert, however, that the waiver required by "The Public Authorities Law is designed solely to punish private contractors who exercise their privilege against self-incrimination in the Grand Jury room" (Ap. Br. 13-14), and, in effect, that it has no relation to the purpose of eliciting information as to the "qualifications" of such contractor, as distinguished from statutes imposing the penalty of dismissal upon public employees for like exercise of such privilege.

Appellant could hardly be more clearly in error. It is the province of the District Attorney to provide for punishment. Appellee, as a state agency charged with protecting the public interest and public funds is, on the other hand, interested only in the responsibility and "qualifications" of those with whom it contracts. Indeed, it is to be noted that appellee has the right and duty, under Section 151 of the Public Housing Law, to "* * * make rules and regulations

governing the qualification of bidders * * *" or even to "prequalify" them. Why, therefore, is a statute such as 2601 or 2602 of the Public Authorities Law to be considered any the less designed to elicit legitimate information as to the qualifications of such contractors than is Section 1123 of the Charter, or similar governmental requirements where, on this basic ground, this Court has consistently upheld the constitutionality of the dismissal or disqualification of public employees? *U. S. ex rel. Laino* v. *Warden, supra; Beilan* v. *Board of Public Works,* 357 U. S. 399 (1958); *Lerner* v. *Casey,* 357 U. S. 468 (1958); *Nelson* v. *Los Angeles,* 362 U. S. 1 (1960); *Garner* v. *Board of Public Works,* 341 U. S. 716 (1951); *Orloff* v. *Willoughby,* 345 U. S. 83 (1952).

See, also,

> Wigmore, Treatise, Law of Evidence, V. 8, Sections 2275 and 2275(a), pp. 435-437, *3rd Ed.,* and footnote in *United States* v. *Warden of Wallkill Prison,* 246 F. Supp. 72, 94.

Furthermore, while statutes like Section 1123 of the Charter require answers to be given by public employees in the broad field "* * * regarding the property, government or affairs of the city * * *", Sections 2601 and 2602 of the Public Authorities Law require answers considerably more limited and closely related to the "qualifications" of a public contractor *per se,* in that they are designed to elicit information restricted to "* * * any transaction or contract had with the State", its political subdivisions and agencies, including public authorities like appellee (cf. *Slochower* v. *Board of Higher Education,* 350 U. S. 551, 558; and see *Spevack* v. *Klein,* 385 U. S. 511, concurring opinion of Mr. Justice Fortas, 358 U. S. at 519).

Finally, the history and purpose of Sections 2601 and 2602 demonstrate that they were expressly adopted with the intent, not to effect punishment, but to obtain informa-

tion which would enable the State and its agencies to weed out and "disqualify" irresponsible and corrupt contractors. In approving Chapter 605, Laws of 1959, adding these sections to the Public Authorities Law, the Governor of New York said (McKinney's 1959 Session Laws of New York, pages 1757-1758):

> "This bill provides that a person who refuses to testify before a grand jury with respect to a contract or transaction had with the State or one of its subdivisions will be barred from entering into public contracts for five years and may lose his rights under the terms of all future public contracts which may be pending. The word person is defined to include, under certain circumstances, a partnership and a corporation.
>
> "In a recent grand jury investigation, a number of persons who had transacted business with a governmental agency refused to answer questions about those transactions put to them by the grand jury. In its report, the grand jury recommended consideration of amendments to the law *which would disqualify such persons from further transactions with public agencies.*
>
> "Unlike a private person who may contract with whom he wishes, a public agency usually lets contracts by public auction and is required to accept the lowest bid. For that reason, *it would seem appropriate to disqualify the bids of persons who are unwilling to disclose to a grand jury facts relating to some prior contract with the public.* Likewise, it would seem appropriate that public contracts should provide that the benefits accruing under them be available only so long as the beneficiary is willing, when required by a grand jury, to disclose any information he may have as to a public contract" (Emphasis supplied).

C. Appellant's assertion that the Grand Jury testimony of its officer, if given, would not be available to evaluate its qualifications is without basis.

But, asserts appellant (Ap. Br. 13-14), the waiver required of its officer was solely before a Grand Jury, its proceedings are secret, and it is not authorized to inquire into or render reports on the fitness of non-public employees. Therefore, it is implied, no information relating to appellant's qualifications could have been disclosed even if answers had been given; from which it follows that its disqualification was an unconstitutional punishment based solely upon the exercise of the privilege against self-incrimination. For these propositions there are cited Sections 253, 253-a and 258 of the New York Code of Criminal Procedure (Ap. Br. App. 25-28), and a number of New York cases (Ap. Br. 13).

Again appellant is very much in error. First, it may be seen from the Governor's message on approval of Sections 2601 and 2602 of the Public Authorities Law, that the very birth of those statutes stemmed from a Grand Jury report on fraud and corruption in public contracts, and their clear intent and purpose was to utilize information brought out before Grand Juries "—to disqualify the bids of persons who are unwilling to disclose to a grand jury facts relating to some prior contract with the public."

Second, Section 253-a expressly provides, in its subdivision 1(c), that a Grand Jury may submit a report "proposing recommendations for legislative, executive or administrative action in the public interest based upon stated findings." And by subdivision 2 such report may be made a "public record" upon order of the Court to which it is submitted.

Third, Section 258 imposes secrecy only upon members of the Grand Jury as to what they said, or in what manner they voted upon matters before them. It has been settled that under New York law the Court may in a proper

case order the disclosure of Grand Jury minutes, including their use in disciplinary proceedings against public officials, in the public interest and in the exercise of its judicial discretion. Application of City of New Rochelle, 35 Misc. 2d 254; Application of Scro, 108 N.Y.S. 2d 305; *In re Peo.* v. *Sawpit Gymnasium,* 60 N.Y.S. 2d 593 (not officially reported); *In re Quinn,* 267 App. Div. 913, aff'd 293 N. Y. 787; New York Code of Criminal Procedure, Section 95(2-t).

Fourth, the New York cases cited by appellant (Ap. Br. 13) are completely inapropos. The sole appellate case cited is *Wood* v. *Hughes,* 9 N. Y. 2d 144 decided in 1961. There the New York Court of Appeals held, by a sharply divided Court, that the century old practice of making Grand Jury "presentments" was not authorized by any New York statute, and that absent such statutory authority such presentments could not be made. For the express purpose of overruling this decision Section 253-a of the Code of Criminal Procedure was enacted by the New York Legislature by Chapter 350 of the Laws of 1964, effective July 1, 1964. (McKinney's Session Laws of New York, 1964). This was in compliance with the Governor's message to the Legislature of that year reading, in part, as follows:

> "*Restoration of the Grand Jury Power to Make Presentments.*
>
> In 1961, the Court of Appeals ruled that the grand jury did not have statutory power to make public reports calling attention to unsavory conditions and recommending reforms, although the practice had been followed for more than a century and a half. In the past these presentments have served to arouse the public to fight organized crime, overhaul the parole system, rectify corrupt conditions and halt fraudulent practices.

> It is essential to confirm the grand jury's power to make proper presentments directed to fraud, corruption and misconduct by public officials. I recommend legislation designed to restore this power, with appropriate safeguards against abuse, so that the public can continue to be informed of facts bearing importantly on its welfare."
>
> (McKinney's New York Session Laws, 1964, p. 1934).

The sole case cited by appellant which followed the enactment of Section 253-a of the Code of Criminal Procedure, to wit, *In re Grand Jury,* January, 1967, 52 Misc. 2d 895, decided by the New York Supreme Court in 1967 (Ap. Br. 13) expressly found that where, in the course of an authorized criminal inquiry, facts are developed which require ". . . executive or administrative action in the public interest . . .", under Section 253-a: ". . . the Grand Jury may make recommendations based on stated facts found in the evidence before it for action by the bodies or officers mentioned" (52 Misc. 2d at 896).

And finally, it will be noted that in the *Gardner* case (No. 635; 20 N. Y. 2d 227) the police officer involved had, like appellant's officer in the instant case, refused to waive immunity before a Grand Jury. The New York Court of Appeals sustained his dismissal because the answers he was required to give under a waiver of immunity ". . . patently bore upon his fitness to remain in office, information which the public had a right to know and the petitioner was under a duty to reveal" (20 N. Y. 2d at 230). Obviously, this could only mean that such information is not, under New York law, required to be kept secret in such circumstances although produced before a Grand Jury, and may be made public (cf. *Stevens* v. *Marks,* 383 U. S. 234 (1966)). And see, *In re Quinn,* 293 N. Y. 787, *supra.* Such interpretation of New York law by the highest Court of the State has consistently been held binding upon this Court.

Beilan v. *Board of Ed.*, 357 U. S. 399, 404;
Barsky v. *Board of Regents*, 347 U. S. 442, 448;
Nelson v. *County of Los Angeles*, 362 U. S. 1, 6;
May v. *Andersen*, 345 U. S. 528, 534, 535;
Hicklin v. *Coney*, 290 U. S. 169, 172.

D. The question of a hearing.

Although appellant has made no point of it as such in its brief, the record shows that it did base its charge of arbitrary action by appellee, at least in part, on the fact that no hearing was granted it with respect to the disqualification (A. 11, 20, 22, 23). Inasmuch as that question may arise in considering whether "due process" was afforded it in the action taken by appellee, it will now be discussed. The question of a proper hearing may also arise in Gardner (No. 635) and Sanitation (No. 823).

In *Slochower* (350 U. S. 551, *supra*), this Court pointed out:

> [350 U. S. at 554]: "The Court of Appeals of New York—has authoritatively interpreted § 903[3] to mean that 'the assertion of the privilege against self incrimination is equivalent to a resignation'. Daniman v. Board of Education, 306 N. Y. 532, 538, 119 N. E. 2d 373, 377. Dismissal under this provision is therefore automatic and there is no right to charges, notice, hearing, or opportunity to explain."

While the Slochower dismissal was reversed by this Court it was not on the basis that § 903 was unconstitutional because, as the New York Court of Appeals thus interpreted it, it actually precluded a hearing. That Slochower did not hold § 903 itself unconstitutional in this

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[3] § 903 of the New York City Charter was identical with and was the predecessor of § 1123, in issue in the *Gardner* and *Sanitation* cases.

or any other respect will be hereafter discussed.[4] In fact, this Court pointed out in Slochower that it had dismissed the appeal of thirteen other individuals summarily dismissed under § 903 along with Slochower for pleading their privilege against self-incrimination "for want of a properly presented federal question", in *Daniman* v. *Board of Education,* 348 U. S. 933 (350 U. S. at 555, Note 2).

In *Lerner* v. *Casey,* 357 U. S. 468 (1958), this Court said:

> [357 U. S. at 473]: "It is said that New York's statute deprives him of procedural due process, in that it provides for dismissal of employees in the first instance without a statutory right to a hearing, opportunity for cross examination, or disclosure of the evidence on which dismissal is based. However, appellant is in no position to complain of procedural defects in the statute. His own refusal to answer blocked proceedings at his appearances before the Department of Investigation, and more important he failed to pursue his administrative remedy by appealing to and obtaining a hearing before the Civil Service Commission."

See also, *Nelson* v. *County of Los Angeles,* 362 U. S. 1 (1960); *Orloff* v. *Willoughby,* 345 U. S. 83.

The failure of appellant in the case at bar to pursue the adequate and exclusive *judicial* remedy afforded by Section 2603 of the Public Authorities Law should be no less fatal to its appeal here than was that of Lerner to pursue his *administrative* remedy. As interpreted by the New York Court of Appeals such judicial proceeding would have given appellant full opportunity to air its contention that its erstwhile president had legitimately resigned and severed all connection with it, and that by reason thereof

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[4] Petitioner's Brief (pp. 9-12) in the *Sanitation* case contends that it did. And see Ap. Br. 9-10 in the case at bar.

no "vicarious penalty" should have been visited upon it for his refusal to waive his privilege against self-incrimination (see Ap. Br. 15-17).[5] For, said the Court of Appeals:

> [20 N. Y. 2d 370, at 376-377]: "There may be times when the statute will operate to penalize a corporation which had severed its connection with the recalcitrant officer and which has otherwise been cooperative. The Legislature has, however, recognized this problem and has specified a procedure by which disqualification can be removed under such circumstances. (Public Authorities Law, § 2603.) The appellant's exclusive remedy is the procedure outlined in that statute."

That such interpretation of the statute by the highest Court of New York is binding upon this Court has already been seen (*supra*, p. 16).

Actually, the rationale to be distilled from this Court's rulings sustaining the dismissal or disqualification of public employees—with whom, it is respectfully submitted, public contractors should at least be equated—for refusal to waive their privilege against self incrimination or to answer relevant questions, has little to do with hearings or their requirement. Where hearings have been held they have merely been *pro forma* and of little or no defensive value to the person involved, since their net effect has been merely to record the undisputed fact that such person had, indeed, refused to waive or answer questions.

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[5] Actually § 2603 affords not only the remedy of a judicial hearing, but one which would preclude any harm at all to the contractor if he could convince the Court of a justifiable basis for restraining the imposition of the penalty. For subdivision 2 of § 2603 states that upon the filing of his petition the Court may stay the cancellation or termination of any contracts pending a decision thereon (Ap. Br. 24). See *Bowles* v. *Willingham*, 321 U. S. 503, 520, and *Porter* v. *Investors Syndicate*, 286 U. S. 461, 470-471, where such provisions were held to constitute due process.

This was certainly the case in *Gardner* (No. 635) and *Sanitation* (No. 823). In *Beilan* v. *Bd. of Education,* 357 U. S. 399, the statute equated such refusal with "incompetency", a statutory ground for dismissal, and all that was brought out at the hearing was the undisputed fact that such refusal had, indeed, occurred. Said this Court in sustaining the dismissal:

> [357 U. S. 399, at 404]: "The only question before us is whether the Federal Constitution prohibits petitioner's discharge for statutory 'incompetency' based on his refusal to answer the Superintendent's questions."

In *Garner* v. *Bd. of Public Works,* 341 U. S. 716, the mere refusal to take an oath and execute an affidavit relating to subversive activities or affiliations was held sufficient and valid ground for statutory dismissal, after a hearing which simply brought out that undisputed fact.

In *Nelson* v. *County of Los Angeles,* 362 U. S. 1, a permanent public employee was given a hearing which simply confirmed his undisputed refusal to waive his privilege and answer questions. The hearing resulted in a finding of "insubordination" solely by reason thereof, which, under the statute, was cause for discharge. A temporary employee was summarily discharged for the same reason and on the same basis and refused a hearing, none being provided by statute for a temporary employee. This Court held both dismissals constitutionally valid.

ARGUMENT II

Statutory provisions which require public employees and public contractors to waive their privilege against self incrimination and to answer questions relevant to their fitness or qualifications, on pain of dismissal or disqualification, are constitutionally valid.

The *Gardner* (No. 635) and *Sanitation* (No. 823) cases, and with them, presumably, the case at bar, are patent

sequels to *Garrity* v. *New Jersey*, 385 U. S. 493 (1967), and *Spevack* v. *Klein*, 385 U. S. 511 (1967), and will undoubtedly supply the answer to the Court's present views on the constitutional question in those cases expressly not reached (385 U. S. at 516, Note 3; and see concurring opinion of Mr. Justice Fortas in *Spevack*, 385 U. S. at 519-520). That is the question whether a public employee (in *Garrity*, a policeman) may be dismissed who invokes the privilege against self incrimination when asked questions relating to his conduct in office, especially when, as Justice Fortas stated, they are

> "* * * questions specifically, directly and narrowly relating to the performance of his official duties.* * *." (385 U. S. at 519)

Here, in a nutshell, is the rationale which underlies cases like *Beilan, Garner, Nelson, Lerner, Orloff* v. *Willoughby*, 345 U. S. 83, and *Laino*, and by which they may be harmonized with cases like *Slochower, Garrity, Spevack, Konigsberg* v. *State Bar of California*, 353 U. S. 252 (1952), *Malloy* v. *Hogan*, 378 U. S. 1 (1964), *Griffin* v. *California*, 380 U. S. 609, and *Stevens* v. *Marks*, 383 U. S. 234 (1966). A person not related to governmental functions may not be made to suffer a penalty for refusing to waive his Fifth Amendment privilege or to have that made "costly" (e.g., *Griffin, Malloy, Spevack*), and no one, private or public, may be compelled to testify against his will and thereby be subjected to actual or threatened criminal prosecution (*Stevens, Garrity, Malloy, Murphy* v. *Waterfront Commission*, 378 U. S. 52 (1964)). But the overriding public interest of the State in preserving the integrity, responsibility and qualifications of its public servants (*Beilan, Garner, Nelson, Lerner, Orloff*), and in eliminating those not qualified by reason of fraud and corruption from contracting with it (*Laino*), tips the scale of accommodation between private rights and the public interest in favor of

the constitutionality of statutes like Section 1123 of the New York City Charter and 2601 of the Public Authorities Law; provided that they operate only to the extent of disqualifying or dismissing such public employees or public contractors while preserving to them their unquestioned constitutional right to remain silent, if they so choose.

Slochower was certainly not to the contrary, and did not invalidate then Section 903 (now Section 1123) of the New York City Charter itself, as is now contended. All that was held was that the *application* of the statute in the particular circumstances of that case unconstitutionally invaded Slochower's rights. Said the Court in *Slochower:*

> (350 U. S. at 555): "We do not decide whether a claim under the 'privilege or immunities' clause was considered below, since we conclude the summary dismissal of appellant in the circumstances of this case violates due process of law."

The circumstances referred to by the Court were these: It found, first, that Slochower's dismissal had been predicated upon an inference of guilt derived from the very fact of the invocation of his Fifth Amendment privilege. This the Court vigorously condemned, saying:

> (350 U. S. at 557): ". . . we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment . . . In Ullman v. United States, 350 U. S. 422, 100 L. ed. 511, 76 S. Ct. 497 . . . we scored the assumption that those who claim this privilege are either criminals or perjurers."

Second, the Court found that the inquiry at which Slochower invoked the privilege was before a Congressional Committee, not a City or State agency, and expressly had no relation either to his qualifications or the "• • • property, affairs or government of the city, or • • • official

conduct of city employees", to which Section 903 limited the waiver requirement (350 U. S. at 558).

Third, the Court found that Slochower had long before given the State authorities full information on the subject of his Communist affiliations, which were the object of the inquiry, that he had been continued for many years in his position with such full knowledge, and that his qualifications for his position were otherwise in no way attacked.

The Court quite clearly indicated, on the other hand, that had the inquiry been properly directed to an ascertainment of his qualifications for continued employment, Slochower, while having the absolute right to refuse to answer on the Fifth Amendment ground, could constitutionally have been dismissed therefor. On this basis the Court distinguished Slochower from *Garner* v. *Board of Public Works*, 341 U. S. 716 (1950), as follows:

> (350 U. S. at 558): "In this respect the present case differs materially from Garner, where the city was attempting to elicit information necessary to determine the qualifications of its employees. Here, the Board had possessed the pertinent information for 12 years, and the questions which Professor Slochower refused to answer were admittedly asked for a purpose wholly unrelated to his college functions. On such a record the Board cannot claim that its action was part of a bona fide attempt to gain needed and relevant information."

And finally, said this Court:

> (350 U. S. at 559): "This is not to say that Slochower has a constitutional right to be an associate professor of German at Brooklyn College. The State has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continued employment to be inconsistent with a real interest of the State. But there has been no such inquiry here."

That *Slochower* accordingly cannot be construed as having invalidated statutes like Section 1123 of the Charter, involved in the *Gardner* and *Sanitation* cases now before the Court, or Section 2601 of the Public Authorities Law, involved in the case at bar, is further confirmed by the Court's decisions subsequent to Slochower, which was decided in 1955. *Beilan* (1958), *Lerner* (1958), and *Nelson* (1960) each distinguished Slochower on one or more of the grounds above noted, and each held valid the dismissal of a public employee who invoked his Fifth Amendment privilege and refused to answer relevant questions related to his fitness and qualifications for public employment.

It thus becomes clear, as stated above, that whether they sustained or reversed the dismissals involved, the rationale underlying the decisions of this Court to date on the constitutional principle here in question may be summarized thus: A public employee, like all others, has an absolute constitutional right to invoke his Fifth Amendment privilege against self incrimination in any governmental inquiry. He does not, however, have a right to do so and to refuse to answer questions ". . . specifically, directly and narrowly relating to the performance of his official duties . . ." (Mr. Justice Fortas in *Spevack*, 385 U.S. at 519, *supra*) and still retain his public employment.

That a public contractor like this appellant should be subject to no less a burden with respect to questions specifically, directly and narrowly relating to the performance of its public contracts (Public Authorities Law, Section 2601) in order to determine its qualifications for additional such employment would seem inescapably to follow in all reason, logic and equity, as has been so cogently stated by Tenney, D. J. in *Laino, supra.*

ARGUMENT III

The contention that Section 2601 of the Public Authorities Law imposes an unconstitutional condition on doing business with the State or its agencies is without basis.

Appellant asserts that the "condition" provided for in the contracts involved, pursuant to the mandate of Section 2601 of the Public Authorities Law, to wit, that its officers must waive immunity and answer relevant questions before a Grand Jury in order to avoid its disqualification from bidding, is an unconstitutional condition to the granting of a governmental benefit or privilege. For this proposition it cites cases like *Frost* v. *Railroad Commission,* 271 U. S. 583; *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1, and others of similar import (Ap. Br. 18-19).

In none of these cases was there involved a contract between the State or one of its agencies for the performance of public work, as does the case at bar, or for the furnishing of materials or similar direct contracts with the State or its agencies. On the contrary, what they involved was strictly such a limitation, condition or imposition on the right to conduct private business or to earn a livelihood within the State[6] as to constitute, variously, a denial of equal protection of the laws, of freedom of contract, of taking of private property without due process, of violation of the commerce clause of the Constitution, or other constitutional infringement.

The *Frost* case is typical of this. There the State prohibited the use of the public highways entirely to the plaintiff, a private carrier, unless it became a public carrier

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[6] It will be noted that appellant asserts that less than fifteen per cent of its annual volume of work was performed for appellee (A10).

subject to all of the regulations, limitations and controls imposed upon a public carrier.

Said the Court:

> (271 U. S. at 592): "Thus, it will be seen that, under the act as construed by the state court, whose construction is binding upon us, a private carrier may avail himself of the use of the highways only upon condition that he dedicate his property to the business of public transportation and subject himself to all the duties and burdens imposed by the act upon common carriers . . . . The requirement does not apply to a private carrier qua private carrier, but to him only in his imposed statutory character of common carrier."

The Court accordingly went on to say that, even assuming that the State would have the right to deny the use of the highways to the plaintiff entirely (without so deciding), such a condition to its use was in violation of the constitutional guarantee of due process, which was here ". . . open to destruction by the indirect but no less effective process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion" (271 U. S. at 593).

The rulings of this Court with respect to conditions and limitations which may properly be included in contracts between the government, State or Federal, or their agencies, with private contractors for the performance of public work or the furnishing of materials or services, are on an entirely different basis.

Thus, in *McMullen* v. *Hoffman*, 174 U. S. 639 (1898), this Court said:

> (At 651): "Upon general principles it must be apparent that biddings for contracts for public works cannot be surrounded with too many precautions for the purpose of obtaining perfectly fair and bona fide bids.

Such precautions are absolutely necessary in order to prevent the successful perpetration of fraud in the way of combinations among those who are ostensible rivals but who in truth are secretly banded together for the purpose of obtaining contracts from public bodies such as municipal and other corporations at a higher figure than they otherwise would."

In *Atkin* v. *Kansas,* 191 U. S. 207 (1903), the Court said:

(at 222-223): "It cannot be deemed a part of the liberty of any contractor that *he* be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the state. On the contrary, it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities." (Emphasis the Court's).

(at 224): "We rest our decision on the broad ground that the work being of a public character, absolutely under the control of the state and its municipal agents acting by its authority, it is for the state to prescribe the conditions under which it will permit work of that kind to be done."

And in *Perkins* v. *Lukens Steel Company,* 310 U. S. 113 (1940), the Court said:

(at 127): "Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases."

To similar effect are:

Heim v. *McCall,* 239 U. S. 175, 191 (1915);
People v. *Crane,* 214 N. Y. 154, aff'd *Crane* v. *New York,* 239 U. S. 195 (1915).

The distinction between cases like *Frost, Western Union Telegraph* and others cited by appellant and those like *Atkin* and the others cited above has been succinctly set forth in *Adkins* v. *Children's Hospital,* 261 U. S. 525 (1922), where the Court upheld the constitutionality of conditions in public work contracts: ". . . as depending, not upon the right to condition private contracts, but upon the right of the government to prescribe the conditions upon which it will permit work of a public character to be done for it, or in the case of a state, for its municipalities" (261 U. S. at 547).

That the "condition" imposed by Section 2601 of the Public Authorities Law, and the provisions of the contracts in question mandated by it, is one of the State's legitimate "precautions for the purpose of obtaining perfectly fair and bona fide bids" (*McMullen* v. *Hoffman, supra*), can hardly, it is respectfully submitted, be reasonably disputed. This is especially so in the light of its intent and purpose, as has been seen (see Argument I, *supra*) to elicit appropriate information as to the "qualifications" and responsibility of prospective contractors for future bidding on public contracts, and to weed out and disqualify fraudulent and corrupt ones.

On this subject it may be noted that there are numerous statutory conditions required to be inserted in public contracts, State and Federal, the violation of which result in severe penalties, including "black-listing", which would appear to be even more onerous than that in issue here, and which have withstood the test of judicial scrutiny: Among these are those required by:

The "Buy American" Act, 41 U.S.C., 10b (1933)—Black-listing for failure to comply with requirements to use American made materials.

The Davis-Bacon Act, 40 U.S.C., 276a-2 (1935)—Black-listing for failure to pay prevailing wages.

The Walsh Healy Public Contracts Act, 41 U.S.C., 37 (1936)—Black-listing for violating wage, hours and safety provisions.

As to conditions to public employment, see *United Public Workers* v. *Mitchell,* 330 U. S. 75 (1946), where the Hatch Act, now 5 U.S.C., Section 1502, prohibiting Federal civil service employees from engaging in political activties, was held to be constitutional. Cf.: *Caldwell* v. *Louisiana,* 282 U. S. 801 (1930).

It is a peculiar and obviously inconsistent circumstance in this case that appellant has raised no constitutional issue with respect to the requirement of Section 2604 of the Public Authorities Law that its officer execute, in each of the contracts, a Statement of Non-Collusion (see Statement of Facts, *supra,* p. 2) under penalty of perjury. That was as much a "condition" requiring him to incriminate himself in order for appellant to obtain the privilege or benefit of the contract as was the requirement for answering questions concerning prior public contracts before the Grand Jury. Yet he voluntarily executed it, was indicted, along with appellant, for perjury for falsifying it (A. 110-112), and both subsequently pleaded guilty to a second indictment for Conspiracy to Prevent Competitive Bidding on Public Contracts, to cover both indictments. (See Statement of Facts, *supra,* pp. 5-6, Note 2, and App. 42-43).

This is also a conclusive demonstration of the concrete and eminently reasonable basis, in the public interest, for requiring both the waiver of immunity which is here under challenge, as well as such non-collusive statement. (See *McMullen* v. *Hoffman,* 174 U. S. 639, 651, *supra.*)

Finally, the question might well be asked whether any constitutional attack could possibly be made against similar "conditions" were they to be included in contracts negotiated with or bid upon for a private firm which desired

thereby to reduce the possibility of fraud or collusion. Can it reasonably be said that the public interest and public funds cannot constitutionally be similarly safeguarded?

ARGUMENT IV

Regardless of the outcome of the *Gardner* (No. 635) and *Sanitation* (No. 823) cases, the distinguishing circumstances of the case at bar dictate its affirmance.

It has been contended in this brief (Argument I, *supra*) that if the constitutionality of Section 1123 of the New York City Charter, attacked in the *Gardner* and *Sanitation* cases, is upheld, then *ipso facto* so should be that of Section 2601 of the Public Authorities Law in issue herein, and that the judgment in this case should accordingly be affirmed. Appellee by no means concedes that the converse is true, and respectfully submits that it is not. The distinguishing features of this case, either as a general matter applicable to all public contractors subject to the requirements of the Public Authorities Law, or with respect to this particular appellant as disclosed by this record, or both, are such as to dictate an affirmance herein regardless of the outcome in *Gardner* and *Sanitation*.

A. As Section 2601 of the Public Authorities Law affects contractors generally.

1. It has been asserted that Section 2601 is repugnant to the due process clause of the Fourteenth Amendment. This Court has held, however, that where an adequate judicial review is afforded by a statute affecting property rights, especially where there is provision for a stay pending such review, due process is satisfied. Section 2603 of the Public Authorities Law, as interpreted by the New York Court of Appeals in this case (20 N. Y. 2d 370, at 376-377, *supra*), expressly provides for such review. It

further expressly provides for a stay. Section 1123 of the New York City Charter on its face provides for neither.

In *Bowles* v. *Willingham*, 321 U. S. 503 (1944), this Court said:

> (at 520): "Here Congress has provided for judicial review of the Administrator's action. To be sure, that review comes after the order has been promulgated; and no provision for a stay is made. But as we have held in Yakus v. United States . . . (321 U. S. 414), that review satisfies the requirements of due process. As stated by Mr. Justice Brandeis for a unanimous Court in Phillips v. Commissioner of Internal Revenue, 283 U. S. 589, 596, 597) . . .: 'Where only property rights are involved, mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate.'"

In *Porter* v. *Investors Syndicate*, 286 U. S. 461 (1932), this Court said:

> (at 470-471): "Where as ancillary to the review and correction of administrative action, the state statute provides that the complaining party may have a stay pending final decision, there is no deprivation of due process, although the statute in words attributes final and binding character to the initial decision of a board or commissioner."

2. What is involved in Section 2601 situations are voluntary undertakings by contractors in competitive bidding for a particular, profitable public contract, with full knowledge of and assent to each of its conditions and specifications, including the requirement for waiver of immunity by its officers in Grand Jury investigations. This is but one of the contractual commitments for which the public agency has bargained, and to which each of

its bidders has subscribed. They should be held to their bargain.

As the New York Court of Appeals has said in *Campbell* v. *City of New York*, 244 N. Y. 317 (citing *Atkin* v. *Kansas*, 191 U. S. 307, *supra*);

> (244 N. Y. at 327): "The contractor takes the contract as the State tenders it, or leaves it altogether. He is not injured in his constitutional rights by being put to the election. * * * He may think the risk too great. He will then decline to enter into relations with a municipality so exacting. He may survey the risk and take it. He will then be bound by the promise according to its meaning * * *".

On the other hand, State statutes having the effect of Section 1123 of the New York City Charter have been imposed upon public employees after entering into their employment, without their assent, and nevertheless held valid. Cf: *Garner, Beilan, Lerner, Nelson, United Public Workers, supra.* Moreover, in these cases the entire livelihood of the public employee was involved. Not so with contractors, who may take their business elsewhere where they will not be subject to the requirements of public contracts here complained of, if they are not prepared to subscribe to them.

3. What a public contractor is required to subscribe to under Section 2601 is an agreement to waive a constitutional privilege which at the most will affect nothing more than a property right, to wit, the contract, which is subject to cancellation, and, if that can also be considered a property right, his opportunity to bid on future public contracts. Such a waiver has been held to be valid. Cooley, in his Treatise on Constitutional Limitations (8th Edition), Vol. 1, says, as to this, on pages 368-369:

> "Where a constitutional provision is designed for the protection solely of the property rights of the

citizen, it is competent for him to waive the protection, and to consent to such action as would be invalid if taken against his will", citing:

Sheppard v. *Barron*, 194 U. S. 553;
Humbird v. *Avery*, 195 U. S. 480;
Pierce v. *Somerset Railway*, 171 U. S. 641, 648.

See also:

Wall v. *Parrot Silver & Copper Co.*, 244 U. S. 407, 412;
Johnson v. *Zerbst*, 304 U. S. 458, 464.

By their voluntary agreement to the contractual provitions mandated by Section 2601 public contractors waive, in effect, not their personal constitutional privilege against self-incrimination, which they may continue to invoke if they choose, but their property rights made a condition to such waiver.

B. As the circumstances of this case, as disclosed by the record, relate to this appellant.

1. It will be noted that although its Notice of Claim filed with appellee by appellant (A. 24-27) sought damages for wrongful cancellation of the contracts and their reinstatement, as well as removal of its disqualification from future bidding, appellant has abandoned the cancellation issue and bases its entire case upon the disqualification from bidding (A. 13, 49, 70). Accordingly, if its asserted right to such future bidding is not one that is cognizable as constitutionally protected, appellant has no case here.

The New York Courts have held that the right to bid is not a property right. *Matter of Haskell-Gilroy, Inc.* v. *Young*, 20 Misc. 2d 294, aff'd 10 A. D. 2d 629, leave to app. den'd 10 A. D. 2d 717.

As such, this Court has held that a prospective bidder does not even have standing to challenge the deprivation

of his asserted right to bid. In *Perkins* v. *Lukens Steel*, 310 U. S. 113 (1940) this Court said:

> (at 125-126): "They claim a standing by asserting that they have particular rights under and even apart from statute to bid and negotiate for Government contracts * * *.
>
> "Section 3709 of the Revised Statutes requires for the Government's benefit that its contracts be made after public advertising. It was not enacted for the protection of sellers and confers no enforceable rights upon prospective bidders * * *."
>
> (at 127): "It was not intended to be a bestowal of litigable rights upon those desirous of selling to the Government; it is a self-imposed restraint for violation of which the Government—but not private litigants—can complain."

Cf. New York Public Housing Law, Section 151 (McKinney's Consolidated Laws of New York, Book 44A) (App. 39).

2. What is before the Court in this particular case is a claim that a constitutional right was infringed, to wit, the Fifth Amendment right to remain silent and not to incriminate oneself. It is said that such infringement resulted from the fact that that right was made "costly" (Ap. Br. 11). To obtain relief from such infringement surely the person who invokes the privilege must show that it became costly to *him*. That person is George Campbell, Jr., an individual who is not even a party to this litigation. Even if he were he could not show such a thing because, as has been seen, having assertedly resigned his offices and surrendered his stock he was, by the repeated and adamant assertions of appellant itself throughout the record (A52, 95-98; and see Note 1, p. 4 of this Brief, *supra*) actually a total stranger to it when he asserted the privilege. Whatever cost there was in this particular case

was not to George Campbell, Jr., the individual who invoked the privilege. There was, of course, a cost to appellant, but that was one it voluntarily subscribed to, knowingly, voluntarily, and in competition with others for these lucrative contracts. The fact that it assumed a risk of action or inaction by a third party is, it is respectfully submitted, purely a contractual and not a constitutional matter. It is nothing new in the law of contracts—and in effect, that is what the lower New York Courts here held (A34; 130).

Were George Campbell, Jr. a party to this litigation and complaining of *his* disqualification—or even, were he a party and complaining of the disqualification of a corporation in which he had an interest at the time he was asked to waive his Fifth Amendment privilege—it might be contended that he was then confronted with a choice which would prove "costly" if he refused to waive, even if indirectly because of such interest. But that is not this case, and, it is respectfully submitted, it will be time enough for this Court to consider it when that situation is presented to it. Cf. *Holland* v. *Hogan*, 272 F. Supp. 855, appeal pending Oct. T., 1967, No. 653.

In this connection it will be noted that the opinion of the New York Court of Appeals herein (A134-135) did not find anything contrary to appellant's claim that George Campbell, Jr. had terminated all relationship with it prior to his refusal to waive. Actually recognizing that as a fact, it held that under the particular circumstances of such termination he "* * * *shall be deemed* to have acted *in his capacity* as a corporate officer when he refused to sign the waiver" (emphasis supplied). Such interpretation of the Court of Appeals, it is respectfully submitted, is binding upon this Court.

3. Finally, this Court has held that the privilege against self-incrimination is a purely personal one, and can neither be asserted by a corporation on behalf of its individual of-

ficer, or by such individual on behalf of a corporation. In *Baltimore and Ohio R. Co.* v. *Interstate Com. Com.*, 221 U. S. 612, this Court said:

> (at 622): "With respect to its officers, it would be sufficient to say that the privilege guaranteed to them by this amendment is a personal one which cannot be asserted on their behalf by the corporation * * *"

See also:

Hale v. *Henkel*, 201 U. S. 43, 47, 75;
Wilson v. *United States*, 221 U. S. 361, 383-385;
Essgee Co. v. *United States*, 262 U. S. 151;
United States v. *White*, 322 U. S. 694, 699.

CONCLUSION

The determination of the New York Court of Appeals appealed from herein should be affirmed.

Dated: New York, New York, April 10, 1968.

Respectfully submitted,

HARRY LEVY,
Attorney for Appellee.

PAUL W. HESSEL,
I. STANLEY STEIN,
of Counsel.

APPENDIX TO APPELLEE'S BRIEF

Public Housing Law, Section 2

§ 2. Policy of state and purpose of chapter

It is hereby declared that in certain areas of cities, towns and villages of the state there exist insanitary and substandard housing conditions owing to overcrowding and concentration of the population, improper planning, excessive land coverage, lack of proper light, air and space, insanitary design and arrangement, or lack of proper sanitary facilities; that these conditions are chiefly in areas where low rent dwellings prevail and that such conditions and dwellings are a menace to the health, safety, morals, welfare and reasonable comfort of the citizens of this state; that there is not an adequate supply of adequate, safe, and sanitary dwelling accommodations for persons of low income; that these conditions cause an increase and spread of disease and crime and constitute a menace to the health, safety, morals, welfare, and comfort of the citizens of the state; that these conditions inflict blight upon the economic value of large areas, impair private investments and the source of public revenues; that these conditions cannot be remedied by the ordinary operation of private enterprise; that these conditions require that provision be made for the investment of public and private funds at low interest rates in low rent housing and the acquisition at fair prices of adequate parcels of property, the gradual demolition of existing insanitary and unsafe housing and the construction of new housing facilities, under public supervision in accord with proper standards of sanitation and safety and at a cost which will permit monthly rentals which persons of low income can afford to pay; that loans and subsidies by the state and its subdivisions are necessary for such purposes; that the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas or the providing of adequate, safe and sanitary low rent housing accommodations in these

areas and elsewhere for persons and families of low income, or both of these, are public uses and purposes for which public money may be spent and private property acquired; that these conditions require the creation of the agencies, instrumentalities and corporations hereinafter prescribed, which are declared to be agencies and instrumentalities of the state for the purpose of attaining the ends herein recited; and the necessity in the public interest for the provisions hereinafter enacted is hereby declared as a matter of legislative determination.

Public Housing Law, Section 3

§ 3. Definitions

The following terms, whenever used or referred to in this chapter, shall have the following meaning, unless a different meaning clearly appears from the context:

* * * * * *

2. The term "authority" means a public corporation which is a corporate govermental agency (except a county or municipal corporation) organized pursuant to law to accomplish any or all of the purposes specified in article eighteen of the constitution and includes the following municipal housing authorities established prior to the first day of January, nineteen hundred thirty-nine pursuant to chapter four of the laws of nineteen hundred thirty-four and amendments thereof, namely, . . . New York city housing authority, . . .

Public Housing Law, Section 401

§ 401. New York City Housing Authority

* * * * * *

The New York City Housing Authority is hereby constituted and declared to be a body corporate and politic with all the powers, rights and duties set forth in article five of the former state housing law.

Public Housing Law, Section 151

§ 151. Authority construction contracts

Contracts of an authority for demolition, excavation, construction, alteration, renovation or for purchase of materials or supplies shall be in such form and contain such combination of work or trades and such terms and provisions as may be deemed advisable by the authority. All such contracts in excess of ten thousand dollars shall be made on sealed bids, in compliance with a public notice advertised at least once, not less than twenty days before the date set for the receipt of bids, in the official publication of the municipality, or if none exists, in a newspaper circulating in the municipality. If the authority shall deem it to its best interest or necessary or desirable to effectuate the purposes of this chapter or the economy and efficiency in construction and operation of a project, the authority by majority vote of its members may either reject all bids or readvertise for bids or by unanimous vote of its members may accept a bid other than the lowest bid. In any such contract there may be inserted in the discretion of the authority, a provision that additional work may be done or materials and supplies furnished or that work or materials may be omitted for the purpose of completing such contract in accordance with any changes, omissions or additions in the specifications of any such contract. Each contract shall provide that in the case of default by the contractor the authority may adopt on behalf of the authority all subcontracts made by such contractor and all such subcontractors shall be bound by such adoption if made, and the authority may relet, with or without public advertisement, the work specified in the original contract, exclusive of so much thereof as shall be provided in any subcontracts so adopted. An authority may make rules and regulations governing the qualifications of bidders, the submission of combined bids by two or more contractors, the award and execution of the contract, security, if any, for execution and performance of the contract, and any

other matters relating to the contract. The bidding may be restricted to those who shall have qualified prior to the receipt of bids according to standards fixed by the authority, provided that notice or notices for the submission of qualifications shall be published in the official publication of the municipality, or if none exists, in a newspaper circulating in the municipality, at least once, not less than ten days prior to the date fixed for the filing of qualifications. Nothing in this section shall be construed to limit the power of the authority to carry out a project or any part thereof directly by the officers, agencies and employees of the authority, or by any government, or to purchase or acquire materials or supplies through the purchasing officer, department or agency of a government.

Public Housing Law, Section 157 (1)

§ 157. Claims and actions against authorities

1. In every action or special proceeding, for any cause whatsoever, prosecuted or maintained against an authority, the complaint or necessary moving papers shall contain an allegation that at least thirty days have elapsed since the demand, claim or claims upon which such action or special proceeding is founded were presented to the authority for adjustment and that it has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment.

Article 18, Section 1, New York State Constitution

§ 1. [Housing for persons of low income; slum clearance.]

Subject to the provisions of this article, the legislature may provide in such manner, by such means and upon such terms and conditions as it may prescribe for low rent housing for persons of low income as defined by law, or for the clearance, replanning, reconstruction and rehabilitation of substandard and insanitary areas, or for both such purposes, and for recreational and other facilities incidental or appurtenant thereto.

McKinney's 1964 Session Laws of New York, Chapter 645, p. 1023—(Public Authorities Law, Section 2604)

§ 2604. Statement of non-collusion in contract with public authority

Every contract hereafter made or awarded by a public authority or by any official of any public authority created by the state or any political subdivision, pursuant to bid, for work or services performed or to be performed or goods sold or to be sold, shall contain the following statement subscribed by the bidder, and affirmed by him as true under the penalties of perjury: Non-collusive bidding certification. The bidder certifies that: (a) the bid has been arrived at by the bidder independently and has been submitted without collusion with any other vendor of materials, supplies, or equipment of the type described in the invitation for bids, and (b) the contents of the bid have not been communicated by the bidder, nor, to its best knowledge and belief, by any of its employees or agents, to any person not an employee or agent of the bidder or its surety on any bond furnished herewith prior to the official opening of the bid.

MISCELLANEOUS CERTIFICATE

No. 847

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

On Indictment for Conspiracy, etc.

No. 3954-66

Filed October 17, 1966

THE PEOPLE OF THE STATE OF NEW YORK,

against

GEORGE CAMPBELL and GEORGE CAMPBELL & CO., INC.,

Defendants.

I, JAMES McGURRIN, County Clerk and Clerk of the Supreme Court, New York County, do certify that it appears from an examination of the Records on file in this office, that on January 8, 1968 the above defendants pleaded guilty during trial of Conspiracy to Prevent Competitive Bidding on Public Contracts to cover this indictment and also to cover Indictment No. 2435-65, before the Honorable Irwin D. Davidson, a Justice of this Court. Date for sentence is set for April 16, 1968.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 12 day of January, 1968.

JAMES McGURRIN
County Clerk and Clerk of the Supreme Court, New York County.

NO FEE
FOR OFFICIAL USE

MISCELLANEOUS CERTIFICATE

No. 892

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

on Indictment for Perjury in the First Degree

No. 2435-65

Filed June 24, 1965

THE PEOPLE OF THE STATE OF NEW YORK,

against

GEORGE W. CAMPBELL, JR. and
GEORGE CAMPBELL PAINTING CORP.

I, JAMES McGURRIN, County Clerk and Clerk of the Supreme Court, New York County, do certify that it appears from an examination of the Records on file in this office, that on January 8, 1968 George W. Campbell, Jr. pleaded guilty to Conspiracy to prevent competitive bidding on public contracts — count nine to cover indictment No. 3954-66 and to also cover Indictment No. 2435-66.

That on January 8, 1968, George Campbell Painting Corp. pleaded guilty to Conspiracy to prevent competitive bidding on public contracts, count nine to cover Indictment No. 3954-66 and to also cover Indictment No. 2435-66.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal this 2 day of April, 1968.

JAMES McGURRIN
County Clerk and Clerk of the Supreme Court,
New York County.

NO FEE
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